(34)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 434.

MARTIN L. SWEENEY, *Petitioner,*

v.

ELEANOR M. PATTERSON, Trading as the Washington Times-Herald, DREW PEARSON and ROBERT S. ALLEN.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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JURISDICTION.

The sole question presented by the petitioner, howsoever stated by him, is whether the judgment of the Court of Appeals for the District of Columbia affirming the judgment of the District Court of the United States for the District of Columbia, in favor of respondents, presents a question or questions of law of public interest and general importance which should be decided by this Court.

ARGUMENT.

The decision of the Court of Appeals merely declares the common law of the District of Columbia in an action of libel. Petitioner concedes that the case is governed by the law of the District of Columbia (Pet. br. p. 15), citing *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. There is no suggestion in the present case, as there was in the recent

case of *Sweeney* v. *Schenectady Union Publishing Co.*, 122 F. 2d 288, 86 L. ed. 867, 1023, in which this Court granted certiorari to the Circuit Court of Appeals for the Second Circuit, that the local law, if correctly declared in the decision challenged, is in derogation of the Constitutional guarantees of freedom of speech and of the press.

In the case of *Del Vecchio* v. *Bowers*, 296 U. S. 280, 80 L. ed. 229, 232, this Court distinctly ruled that a case of this kind from the Court of Appeals of the District of Columbia is not reviewable, stating:

> "In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited *or which declare the common law of the District.* The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application. We therefore granted the writ because of the important question as to the effect of Sec. 20 (d)." (Italics supplied)

The rule of this Court in regard to certiorari to the Court of Appeals for the District of Columbia is, moreover, different in one important respect from the rule in regard to certiorari to the Circuit Courts of Appeals. Certiorari to the latter courts, as stated in *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 205, 206, is granted in order to secure uniformity of decision by those courts in matters concerning which the Federal courts in the several states have a right to independent judgment. Certiorari in *Ruhlin* v. *New York Life Insurance Co.* was granted upon a showing of a probable conflict of decisions in what appeared to be such a matter. In disposing of the case, however, the Court found that the issue before it was one of state law, and it declined to decide that issue. It stated

that had *Erie Railroad Co.* v. *Tompkins* been announced at some prior date, this Court might not have issued a writ of certiorari. It added that as to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari, and that the conflict may be merely corollary to a permissible difference of opinion in the state courts.

Petitioner argues at length that the Court of Appeals did not follow its own prior decisions. The question whether it did or did not adhere to its former rulings with reference to the local law of the District of Columbia does not present a case for review by certiorari in accordance with the rule stated by this Court in the decision cited above. This case does not involve a statute national in its scope nor any other matter as to which a decision of this Court would constitute "a precedent of general application."

Petitioner has, in any event, entirely failed to establish his point. Of the nine cases cited by petitioner (Pet. br. p. 16) as showing the rule of law heretofore followed by the Court of Appeals, only three related to the official conduct of public officials. In two of these three cases, *A. S. Abell Co.* v. *Ingham* [1] and *Washington Times Co.* v. *Bonner*,[2] as noted by the Court (R. p. 20), officials were falsely charged with crime or gross immorality; in the third, *Ashford* v. *Evening Star Newspaper Co.*,[3] the Court of Appeals affirmed the judgment of the trial court directing a verdict for the defendant upon a plea of privilege supported by evidence of truth of the publication. In five of the other six cases cited by petitioner in this connection (Pet. br. p. 16), a Government employee was falsely charged with dishonorable conduct in his private capacity;[4] a former employee of a private concern was falsely reported to have

[1] 43 App. D. C. 582.
[2] 66 App. D. C. 280, 86 F. 2d 836.
[3] 41 App. D. C. 395.
[4] *Bailey* v. *Holland*, 7 App. D. C. 184.

testified falsely in certain proceedings;[5] a clergyman was falsely accused of immoral acts;[6] a "private person who had resigned from public office" was referred to, in a newspaper, as a "disgruntled fanatic, deposed from his office" for good and sufficient reasons and getting off easy when he was simply deposed and nothing more was said concerning the manner in which he had filled his office;[7] and there was a false statement the natural meaning of which was that plaintiffs were gangsters.[8] In *Poston* v. *Washington, Alexandria & Mt. V. R. Co.*,[9] the question before the Court was whether the publication of a grand jury report was privileged, and the Court specifically stated that the discussion of other questions was unnecessary.

Petitioner does not show to this Court that the question decided by the Court of Appeals in the present case was ever presented to that Court prior to the date of the case of *Sullivan* v. *Meyer*,[10] which, the Court held, more than covers the present case (R. p. 20). In *Sullivan* v. *Meyer* the Court of Appeals affirmed the judgment of the court below sustaining a demurrer. The decision was not based upon the privilege of fair comment which might excuse a publication not otherwise excusable. It was based upon the non-libelous character of even "false and distorted statements" relating exclusively to the plaintiff's attitude towards a question of public interest and not impugning his character or motives. Similarly, in the present case the Court of Appeals, affirming the judgment of the lower court which had dismissed the complaint for failure to state a cause of action, did not consider whether the publication complained of was privileged but found merely that, even if false, it was not libelous *per se* (R. pp. 19, 20). The

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[5] *Washington Gaslight Co.* v. *Lansden*, 9 App. D. C. 508.

[6] *Russell* v. *Washington Post Co.*, 31 App. D. C. 277.

[7] *Washington Herald Co.* v. *Berry*, 41 App. D. C. 322, 325, 339, 340.

[8] *Lane* v. *Washington Daily News*, 66 App. D. C. 245, 85 F. 2d 822.

[9] 36 App. D. C. 359, 371.

[10] 67 App. D. C. 228, 229, 91 F. 2d 301.

Court had no occasion to consider the action which might be appropriate on the part of the trial court in a case such as *Meyerson* v. *Hurlbut*, 68 App. D. C. 360, 98 F. 2d 232, in which the publication sued upon was "capable of two meanings, one of which may be libelous and actionable and the other not."

The Court of Appeals, in deciding the question presented in this case, did not act without the light available from decisions of other courts applying the common law in their respective jurisdictions. The Court of Appeals cited (R. p. 19, n. 2) decisions of the highest courts in five states as supporting its view that to publish erroneous and injurious statements of fact and injurious comment or opinion regarding the political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality, or gross incompetence is made and no special damage results, is not "libelous *per se*." The authority of those decisions as statements of the law of the jurisdictions in which they were made cannot be seriously questioned. The Court of Appeals also cited decisions of the courts of last resort in Tennessee and Ohio (petitioner's home state) and decisions of the United States Circuit Court of Appeals for the Third Circuit and the United States District Courts in Texas and Idaho, all holding the identical article here sued upon to be not libelous. It referred to the fact that the Court of Appeals for the Second Circuit by a divided vote, in *Sweeney* v. *Schenectady Union Publishing Co.*, 122 F. 2d 288, had held that the article was libelous *per se* under the law of New York, and that an even division in the Supreme Court had sustained that result. It did not call attention to the fact, which will appear upon comparison of the article sued upon herein (R. pp. 5-6) with the article sued upon in *Sweeney* v. *Schenectady Union Publishing Co.*, that the latter article does not contain a paragraph which is included in the article here sued upon, to the effect that two candidates for the vacant judicial appointment at Cleveland, Ohio, had been eliminated from consideration by the Department of Justice because of big

business or reactionary connections and that a third candidate had been eliminated because he happened to be a Catholic and the last two judicial appointments in Ohio had been Catholics. It is pertinent to add that in a decision made subsequent to the date of the decision of the Court of Appeals for the District of Columbia, the Circuit Court of Appeals for the Tenth Circuit held, in *Sweeney* v. *Anderson, et al.,* 129 F. 2d 756, 758, affirming the dismissal of nine of petitioner's suits for want of prosecution, that a decision of the Circuit Court of the Second Circuit could not be determinative of the question whether the article sued upon was libelous *per se* under the law of Kansas.

Petitioner urges as pertinent (Pet. br. pp. 22-24) the case of *DeStempel* v. *Dunkels,* 54 Times Law Reports 289 (1938), in which the English Court of Appeal held it to be libelous to say of the plaintiff: "Victor is a Jew-hater." The decision in that case was not appealed to the House of Lords and is, therefore, not the decision of the highest court in England. The sole question which the judges in the court below had to decide with respect to the words used was "whether they were actionable as words which related to the plaintiff in his business or occupation." (Op. cit., p. 291). It appears that a certain corporation which was practically the only source from which the plaintiff's employer then drew or could expect in the future to draw its income was owned by Jews to the extent of 85 per cent and that all of the leading men in it were Jews (Op. cit., p. 299). The statement that a man whose livelihood depends on friendly relations with Jews is a "Jew-hater" has evidently a very different significance from the statement in the article here sued upon that a candidate for a judicial appointment in a certain District was opposed by a member of Congress from the same District for the reason that he was a Jew and one not born in this country. It may be noted that according to Halsbury's *Laws of England,* 2nd Ed., by Lord Hailsham, Vol. 20, pp. 397-398, it is generally useless and often misleading to quote authorities to show that particular words have been held in particular cases to

be defamatory; since the meaning of particular words may vary with the context and the circumstances in which they are published.

The case of *DeStempel* v. *Dunkels* was specifically brought to the attention of the Court of Appeals for the District of Columbia in the petition for rehearing filed with that Court by petitioner (R. p. 28). That case could of course, have no more than persuasive authority in the District of Columbia. There is no rule of law that requires the Court of Appeals of the District of Columbia to substitute for its own judgment as to the common law the judgment formed by an English court in the year 1938. Reference is made in this connection to the statement of this Court in *Funk* v. *United States,* 290 U. S. 371, 383, that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions".

Petitioner argues, further, that certiorari should be granted on the ground that the decision of the Court of Appeals is in conflict with decisions of this Court (Pet. br. p. 8). It is respectfully submitted that this ground is untenable. There is no applicable decision of this Court.

The cases in this Court relied upon by petitioner are *Pollard* v. *Lyon, Peck* v. *Tribune Co.,* and *White* v. *Nicholls.*

Pollard v. *Lyon,* 91 U. S. 225, 228, only points out the well-recognized distinction between the actionable quality of words spoken and words written or printed. That question was not involved in the present case.

Peck v. *Tribune Co.,* 214 U. S. 185, involved the publication of an advertisement which, by use of a picture of the plaintiff, attributed to the plaintiff, a woman, the constant use of pure malt whiskey over a period of years. The case arose at a time when undoubtedly the plaintiff by such an advertisement would be seriously hurt in her standing with a considerable and respectable class in the community. This Court did not discuss nor decide, in the *Peck* case, the question, decided by the Court of Appeals in the present case, whether an article relating solely to a political matter and written of a public official in relation to that matter is or is not libelous.

White v. *Nicholls*, 3 Howard (44 U. S.) 266, 285, 291, presented to this Court for decision an evidentiary question relating to the exclusion of testimony as to malice on the part of the defendant in connection with a plea of privilege. The general remarks of Mr. Justice Daniel, as observed by the Circuit Court of Appeals for the Second Circuit in *Sacks* v. *Stecker*, 60 F. 2d 73, 74 (1932), were "rendered . . . before the development of much of the modern law of libel" and "can hardly stand against an overwhelming body of authority in this country and England, where they were in no wise necessary for the decision of the question before the court."

The mere contention that a decision of the Court of Appeals for the District of Columbia is in conflict with a decision of this Court does not, of course, lay the foundation for certiorari. A substantial showing of conflict is indispensable. Such a showing petitioner has not made.

CONCLUSION.

The decision of the Court of Appeals for the District of Columbia declares the common law of the District of Columbia. The question decided is not a question of general importance which should be settled by this Court. The Court of Appeals has not failed to give effect to any applicable decision of this Court. The petition should accordingly be denied.

Respectfully submitted,

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